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5
6 **IN THE SUPREME COURT
STATE OF ARIZONA**

7 **PETITION TO AMEND RULES**
8 **45 AND 84, ARIZONA RULES**
9 **OF CIVIL PROCEDURE**

No. R- _____

10
11 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of
12 Arizona (the "State Bar") respectfully petitions this Court to amend Rule 45 (subpoenas)
13 and Rule 84 (forms) of the Arizona Rules of Civil Procedure. The proposed amendments
14 to Rule 45 seek to (1) clarify ambiguities in the Rule while maintaining its substantive
15 integrity, and (2) make the Rule easier to read for practitioners and non-lawyers. The
16 proposed amendment to Rule 84 seeks to add a uniform subpoena form, which is
17 preliminarily referred to in the text of the proposed amended Rule 45 as "Form 9."

18 A version of proposed amended Rule 45 ("Proposed Rule 45") identifying
19 additions and deletions is attached to this Petition at **Exhibit "A,"** and a "clean" version
20 of Proposed Rule 45 is attached to this Petition at **Exhibit "B."** The proposed amendment
21 to Rule 84—the addition of a uniform subpoena form—is attached to this Petition at
22 **Exhibit "C."**

23 **I. THE NEED FOR AMENDING RULES 45 AND 84**

24 Consideration for proposing amendments to Rule 45 stemmed from circumstances
25 confronted by some practitioners in which trial witnesses have sought to avoid compliance
26 with appearance subpoenas (i.e., hearing, trial or deposition subpoenas) simply by writing

1 a letter to the party or attorney that served the subpoena. Although these types of
2 objections are appropriate under certain circumstances, *see* Part II.F, *infra*, this type of
3 informal objection has caused some difficulty in the ability to timely secure the testimony
4 of witnesses, particularly with respect to hearings and trials. Attached to this Petition at
5 **Exhibits “D,” “E,” “F,” “G,” and “H”** are some redacted examples of the types of
6 “letter objections” that practitioners have received in response to trial subpoenas.

7 It is no surprise that objections to appearance subpoenas have been made using this
8 informal approach given the interplay between the current text of Rule 45 and the
9 mandatory admonition set forth at Rule 45(a)(1)(D) (the “Admonition”). Current Rule 45
10 does not specifically authorize a letter objection to appearance subpoenas. *See, e.g.,* Ariz.
11 R. Civ. P. 45(c)(3)(A) and (B) (requiring or permitting the court to quash or modify a
12 subpoena under certain circumstances “on timely motion”). Rather, the Rule allows for a
13 letter objection in connection with a subpoena commanding the recipient “to produce and
14 permit inspection, copying, testing, or sampling of designated books, documents,
15 electronically stored information, or tangible things in the possession, custody or control
16 of that person, or to permit inspection of premises.” Ariz. R. Civ. P. 45(a)(1)(C)
17 [hereinafter “subpoena *duces tecum*”]. Thus, Rule 45(c)(2)(B) provides:

18 Subject to paragraph (d)(2) of this rule [relating to privileged
19 information], a person commanded to produce and permit inspection,
20 copying, testing, or sampling may, within 14 days after service of the
21 subpoena or before the time specified for compliance if such time is less
22 than 14 days after service, serve upon the party or attorney designated in the
23 subpoena written objection to producing any or all of the designated
24 materials or inspection of the premises - or to producing electronically
25 stored information in the form or forms requested. If objection is made, the
26 party serving the subpoena shall not be entitled to inspect, copy, test, or
sample the materials except pursuant to an order of the court by which the
subpoena was issued. If objection has been made, the party serving the
subpoena may, upon notice to the person commanded to produce, move at
any time for an order to compel the production, inspection, copying, testing,
or sampling. Such an order to compel shall protect any person who is not a
party or an officer of a party from undue burden or expense resulting from
the inspection, copying, testing, or sampling commanded.

1 Ariz. R. Civ. P. 45(c)(2)(B).

2 The Admonition, however, is not clear that an informal letter objection only applies
3 to a subpoena *duces tecum*. Under the heading entitled “Your Right to Object,” the
4 Admonition provides, in pertinent part:

5 You may object to this subpoena if you feel that you should not be
6 required to respond to the request(s) made. Any objection to this subpoena
7 must be made within 14 days after it is served upon you, or before the time
8 specified for compliance, by providing a written objection to the party or
9 attorney serving the subpoena. See Rule 45(c)(2)(B) of the Arizona Rules of
10 Civil Procedure.

11

12 If you object to the subpoena in writing you do not need to comply
13 with the subpoena until a court orders you to do so. It will be up to the party
14 or attorney serving the subpoena to seek an order from the court to compel
15 you to provide the documents or inspection requested, after providing notice
16 to you. See Rule 45(c)(2)(B) of the Arizona Rules of Civil Procedure.

17 Ariz. R. Civ. P. 45(a)(1)(D). Although the first paragraph of the Admonition permits a
18 letter objection to “the request(s),” it does not explicitly state that the “request(s)” to
19 which this paragraph refers are to those set forth in a subpoena *duces tecum*, as opposed to
20 the command to appear in an appearance subpoena. The only way to ascertain that this
21 paragraph applies to a subpoena *duces tecum* is by reading the actual text of the Rule cited
22 (but not quoted or summarized) in that paragraph—i.e., “Rule 45(c)(2)(B) of the Arizona
23 Rules of Civil Procedure”— which seems to defeat the very purpose of the Admonition to
24 provide a recipient with guidance as to his or her obligations.

25 Moreover, it seems apparent that many recipients of appearance subpoenas
26 discontinue reading the Admonition once the first sentence of the second paragraph
27 quoted above has been read, which may lead the recipient to believe that, regardless of the
28 type of subpoena, a letter objection to the party or attorney who served the subpoena is
29 sufficient to stay the recipient’s compliance with the subpoena until otherwise ordered by
30 the court. This appears particularly evident in Exhibits “D,” “E,” and “F” to this Petition.

1 Thus, Proposed Rule 45, in conjunction with the proposed addition of a uniform subpoena
2 form to Rule 84, seeks to clarify this apparent ambiguity.

3 Although it may be possible to resolve this particular issue by amending the
4 language of the Admonition, after reviewing recent amendments to Rule 45 of the Federal
5 Rules of Civil Procedure and conducting a survey of several states that, like Arizona, base
6 their rules of procedure on the Federal Rules, the State Bar has concluded that an overhaul
7 of Rule 45, together with a uniform subpoena form set forth in Rule 84, would be the most
8 appropriate method of achieving a favorable balance between the courts' needs to enforce
9 the subpoena power, *see Ingalls v. Superior Court (Estes Co.)*, 117 Ariz. 448, 450, 573
10 P.2d 522, 524 (App. 1977) ("A subpoena is the medium for compelling the attendance of
11 a witness, and it is a process in the name of the court or judge, carrying with it a command
12 dignified by the sanction of the law." (quoting 81 Am. Jur. 2d, Witnesses, § 9 (1976))),
13 and the needs of subpoena recipients to seek judicial assistance in mitigating the various
14 burdens of the subpoena power through a clearly defined objection procedure. *See*
15 *MacDonald v. Hyder*, 12 Ariz. App. 411, 416, 471 P.2d 296, 301 (1970) (recognizing that
16 subpoena recipients have an interest in protecting against "unreasonable and oppressive"
17 demands (citing *Shepherd v. Castle*, 20 F.R.D. 184 (W.D. Mo. 1957))). The following
18 sections of this Petition describe the significant amendments to Rule 45 proposed by the
19 State Bar.

20 **II. THE PROPOSED AMENDMENTS TO RULES 45 and 84 OF THE** 21 **ARIZONA RULES OF CIVIL PROCEDURE**

22 **A. The Incorporation of Introductory Headings into, and other Stylistic** 23 **and Renumbering Changes to, Proposed Rule 45**

24 In 2007, Rule 45 of the Federal Rules of Civil Procedure was amended as "part of
25 the general restyling of the Civil Rules to make them more easily understood. These
26 changes are intended to be stylistic only." Fed. R. Civ. P. 45, Advisory Committee's Note

1 to 2007 Amendments. Included among the stylistic changes was the addition of several
2 introductory headings throughout the text of the rule. Consistent with the Federal Rules,
3 and in keeping with the goal of making Rule 45 more easily understood, Proposed Rule 45
4 incorporates additional introductory headings. In addition, many of the other proposed
5 amendments to Proposed Rule 45 are merely stylistic in nature and are not intended as
6 substantive amendments.

7 **B. Proposed Rule 45(a) – Deletion of the Admonition from the text of Rule**
8 **45, the Creation of a Uniform Subpoena in Rule 84, the Inclusion of a**
9 **Revised Admonition in the Uniform Subpoena, and Other**
10 **Renumbering and Stylistic Changes**

11 In addition to the actual and perceived infirmities with the substance of the
12 Admonition, the inclusion of the Admonition in the text of Rule 45(a)(1)(D) makes the
13 Rule itself cumbersome to read. Indeed, it is difficult to ascertain where the Admonition
14 ends and the substance of the Rule resumes.¹ As a result, Proposed Rule 45 deletes the
15 admonition from the text of the Rule in its entirety. In order to ensure that subpoena
16 recipients are adequately notified of their rights and duties, however, the State Bar
17 proposes amending Rule 84 to add a uniform subpoena form, the use of which would be
18 required, and which includes a revised admonition that sets forth the rights, duties and
19 objection procedures, depending on the type of subpoena, in accordance with the other
20 proposed amendments to Rule 45. See Exhibit “C.”

21 The first sentence of the final paragraph of Rule 45(a)(1), concerning the joinder of
22 subpoenas *duces tecum* with appearance subpoenas (see footnote 1), has been renumbered
23 to Proposed Rule 45(b)(2). The second sentence of that paragraph concerning the form of

24 ¹ It appears that the Admonition ends and the Rule resumes with the paragraph
25 immediately preceding Rule 45(a)(2), which provides that “[a] command to produce
26 evidence or to permit inspection, copying, testing or sampling, may be joined with a
command to appear at trial or hearing or at deposition or may be issued separately. . . .”
Rule 45(a)(1)(D), Ariz. R. Civ. P.

1 producing electronically stored information has been renumbered to Proposed Rule
2 45(c)(2). The first sentence of Rule 45(a)(2), which specifies the proper court from which
3 an appearance subpoena may issue, has been renumbered to Proposed Rule 45(b)(1), and
4 the second sentence of Rule 45(a)(2), relating to the proper court from which a subpoena
5 *duces tecum* may issue, has been renumbered to Proposed Rule 45(c)(1). This
6 renumbering was done to coincide with the distinctions between appearance subpoenas
7 and subpoenas *duces tecum* as proposed. See Part II.D, *infra*.

8 The remainder of Proposed Rule 45(a) remains largely unchanged. Other than
9 stylistic changes, the general requirements for subpoenas have not been substantively
10 changed. See Proposed Rule 45(a)(1). In addition, other than renumbering, the provisions
11 of Rule 45(a)(3) relating to the issuance of subpoenas by the clerk of the court have not
12 been modified. See Proposed Rule 45(a)(2).

13 **C. Renumbering Rule 45(b) (Service) and (c)(1) (Protection of Persons**
14 **Subject to Subpoenas)**

15 Proposed Rule 45 stylistically amends, and renumbers, the provisions of Rule 45(b)
16 relating to the service of subpoenas. See Proposed Rule 45(d). Rule 45(c)(1) concerning
17 the protection of persons subject to a subpoena has been renumbered to Proposed Rule
18 45(e)(1) as part of the comprehensive scheme for objecting to subpoenas by motion. See
19 Part II.E, *infra*.

20 **D. Proposed Rule 45(b) and (c) – Distinguishing between Appearance**
21 **Subpoenas and Subpoenas *Duces Tecum***

22 Proposed Rule 45 specifically distinguishes between appearance subpoenas, *see*
23 Proposed Rule 45(b), and subpoenas *duces tecum*. See Proposed Rule 45(c). One of the
24 reasons for doing so is the unique ability to object to a subpoena *duces tecum* without the
25 need to file a motion with the court. Thus, the provisions of Proposed Rule 45(c) contain
26

1 the informal objection procedures currently permitted by Rule 45(c)(2)(B). *See* Proposed
2 Rule 45(c)(5); *see also* Part II.D, *infra*.²

3 **E. Proposed Rule 45(b) – Appearance Subpoenas**

4 Proposed Rule 45(b) retains the geographical limitations currently employed by
5 Rule 45(c)(3)(A)(ii) relating to appearance subpoenas. The proposed amendments differ
6 from the current Rule, however, in that the geographic limitations under Proposed Rule 45
7 are stated in the affirmative, rather than merely as bases for the court to quash or modify a
8 subpoena. *Compare* Rule 45(c)(3)(A)(ii) *with* Proposed Rule 45(b)(3)(A) and (B).

9 Proposed Rule 45(b) also adds a new component relating to deposition
10 subpoenas—that is, the subpoena shall state the method of recording the deposition. This
11 provision is consistent with Rule 45(a)(1)(B) of the Federal Rules of Civil Procedure. *See*
12 Proposed Rule 45(b)(4).

13 Finally, implicit in current Rule 45 is the concept that objections to appearance
14 subpoenas must be made by filing a timely motion with the Court. *See* Rule 45(c)(3)(A).
15 Proposed Rule 45(b)(5) explicitly makes the filing of a motion to quash or modify an
16 appearance subpoena a requirement and specifically requires the recipient to attend in the
17 absence of a timely objection and a court order excusing the recipient from compliance.
18 This proposed amendment, however, is not rigid. Rather, the proposed provision permits
19 an alternative to the motion requirement—that is, the subpoena recipient need not attend if

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22 ² Alaska and Hawaii also distinguish between appearance subpoenas and subpoenas
23 *duces tecum*. Alaska R. Civ. P. 45(a), (b) and (d); Haw. R. Civ. P. 45(a), (b) and (d). The
24 primary difference between this aspect of Proposed Rule 45 and its counterparts in Alaska
25 and Hawaii is that those states require “[p]roof of service of a notice to take a deposition”
26 in order for the clerks of court to issue a deposition subpoena. Alaska R. Civ. P. 45(d)(1);
Haw. R. Civ. P. 45(d)(1). Arizona does not currently require proof of service of a notice
of deposition prior to the issuance of a deposition subpoena. Ariz. R. Civ. P. 45(a)(1)(C).

1 excused (1) by the party or attorney serving the subpoena, or (2) by another provision of
2 Proposed Rule 45.³

3 **F. Proposed Rule 45(c) – Subpoenas *Duces Tecum***

4 Proposed Rule 45(c) retains much of the substance of various provisions of the
5 current Rule. A subpoena *duces tecum* may specify the form of producing electronically
6 stored information, *compare* Rule 45(a)(1) *with* Proposed Rule 45(c)(2); a recipient does
7 not need to appear in person unless otherwise commanded to give testimony at a
8 deposition, hearing, or trial, *compare* Rule 45(c)(2)(A) *with* Proposed Rule 45(c)(3); the
9 recipient must produce the requested information either as usually kept or categorized as
10 specified in the subpoena, *compare* Rule 45(d)(1) *with* Proposed Rule 45(c)(4); the
11 requirements for claiming a privilege or protection from disclosure remain unchanged;
12 *compare* Rule 45(d)(2)(A) and (B) *with* Proposed Rule 45(c)(5)(C)(i) and (ii); and the
13 ability to serve a letter objection has been preserved. *Compare* Rule 45(c)(2)(B) *with*
14 Proposed Rule 45(c)(5)(A).

15 The objection procedures of Proposed Rule 45(c)(5) are different, however, from
16 the current provisions of Rule 45(c)(2)(B) in three respects. *First*, a recipient objecting to
17 a subpoena *duces tecum* must have a good faith basis for objecting. Although a good faith
18 objection is implicit in the current version of the Rule, *see* Rule 45(e) (permitting a court
19 to hold a subpoena recipient in contempt for failure to comply “without adequate
20 excuse”), Proposed Rule 45(c)(5)(A) makes a good faith objection an explicit
21 requirement.

22 *Second*, the proposed amendments require the party or attorney who served the
23 subpoena *duces tecum* to take affirmative steps to resolve any objection *before* filing a
24

25 ³ *See, e.g.*, Proposed Rule 45(f) (requiring a court to excuse a non-party from
26 compliance if the subpoena requires the non-party to travel outside the established
geographical limitations).

1 motion to compel compliance, and to serve on all other parties any motion to compel in
2 accordance with Rule 5(c). See Proposed Rule 45(C)(5)(B)(ii). The Rules already require
3 the party or attorney seeking discovery materials to attempt to resolve discovery disputes
4 before requesting assistance from the courts, which is colloquially known as the “meet-
5 and-confer” requirement. See Rule 37(a)(2)(C). The State Bar perceives no appreciable
6 distinction in the context of a subpoena *duces tecum*. Thus, the proposed amendments
7 place the “meet and confer” requirement on the party or attorney serving the subpoena to
8 attempt to informally resolve the recipient’s objections as a condition precedent to filing a
9 motion to compel. The State Bar believes this requirement furthers the ultimate goal of
10 the “meet-and-confer” rules—to resolve disputes, if possible, without the need for court
11 intervention.⁴ Proposed Rule 45(C)(5)(B)(iii) also incorporates, with stylistic
12 amendments, the protections for non-parties who are compelled to comply with a
13 subpoena *duces tecum* against undue burden or expense as set forth in the last sentence of
14 Rule 45(c)(2)(B).

15 Third, Proposed Rule 45(c)(6) is a new provision that incorporates the continuing
16 obligations to disclose and/or supplement information as provided in Rule 26.1 with
17 respect to information received pursuant to a subpoena *duces tecum*. This provision is not
18 intended to impose upon a subpoena recipient a duty to supplement the requested
19 materials after the date of compliance, nor is it intended to necessarily obligate the
20 subpoenaing party or attorney to furnish copies of all information obtained pursuant to a
21 subpoena *duces tecum*. Rather, it is designed to make certain that, at a minimum, the
22 parties involved in the case properly and timely disclose trial exhibits and/or potentially

23
24
25 ⁴ In fact, the State Bar believes that many practitioners encountering objections to
26 subpoenas *duces tecum* do try to informally resolve objections before seeking to compel
compliance.

1 relevant information (including harmful information, *see* Rule 37(d)) pursuant to Rule
2 26.1(a) and (b).

3 **G. The Renumbering of Rule 45(d), (e) and (f) and the Deletion of Rule**
4 **45(g)**

5 As described above, the provisions of Rule 45(d) have been incorporated, verbatim,
6 into other areas of Proposed Rule 45. Rule 45(d)(1), concerning the production of
7 subpoenaed information, is set forth in Proposed Rule 45(c)(4). The provisions of Rule
8 45(d)(2)(A) and (B) relating to claims of privilege or protection from disclosure are set
9 forth at Proposed Rule 45(c)(5)(C)(i) and (ii).

10 Rule 45(e), pertaining to contempt, has been stylistically amended and renumbered
11 to Proposed Rule 45(f). Similarly, Rule 45(f), permitting secondary evidence to prove the
12 content of materials that have not been produced pursuant to a subpoena, has been
13 stylistically amended and renumbered to Proposed Rule 45(g). Rule 45(g)—the “ADA
14 Notification”—has been deleted from the text of Proposed Rule 45 and, instead, has been
15 included in the proposed uniform subpoena. *See* Part II.I, *infra*, and Exhibit “C.”

16 **H. Proposed Rule 45(e) – Objection by Motion**

17 Proposed Rule 45(e), relating to motions to quash or modify a subpoena, is
18 substantially the same as current Rules 45(c)(1) and (c)(3). The distinction between the
19 current Rule and the Proposed Rule is one of form, not substance. The Proposed Rule
20 follows the format set forth in Rule 45(c)(3) of the Federal Rules of Civil Procedure, and
21 describes the circumstances where a court must quash or modify a subpoena, or where a
22 court may exercise discretion in quashing or modifying a subpoena.

23 Proposed Rule 45(e) does add two new provisions, however, neither of which
24 appear in the text of the current Rule. *First*, Proposed Rule 45(e)(2)(D) establishes the
25 time limits for filing a motion to quash or modify a subpoena—i.e., before the time for
26 compliance or within 14 days after service of the subpoena, whichever is earlier.

1 Currently, Rule 45(c)(3)(A) allows for objections “[o]n timely motion,” but the Rule does
2 not define what it means for such a motion to be timely.

3 *Second*, Proposed Rule 45(e)(2)(E) requires the person objecting to a subpoena to
4 serve the objection on the party or attorney who caused the subpoena to be served in
5 accordance with Rule 5(c). The remainder of this proposed provision requires the
6 subpoenaing party or attorney to serve the motion to quash or modify on all other parties
7 in accordance with Rule 5(c).

8 **I. Proposed Rule 84 – Uniform Subpoena Form**

9 As stated above, the State Bar proposes adding a uniform subpoena to the forms set
10 forth in Rule 84 for purposes of, among other things, accommodating an admonition to
11 subpoena recipients concerning the recipient’s rights and duties in responding to the
12 subpoena.⁵ The State Bar believes that the revised admonition set forth in Exhibit “C”
13 more clearly identifies those rights and duties, and in particular, the procedure for
14 objecting to a subpoena, depending on the subpoena type. To facilitate identifying the
15 type of subpoena the recipient has received, the uniform subpoena is prepared in a
16 “checkbox” format with appropriate headings.⁶ In addition, the form also includes the
17 “ADA Notification” currently required by Rule 45(g).

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23 ⁵ The state of Washington also utilizes a uniform subpoena form. Wash. R. Civ. P.
24 45(h) (form).

25 ⁶ This format is similar to that used in Rule 84, Form 3 (Joint Alternative Dispute
26 Resolution Statement to the Court).

1 **III. CONCLUSION**

2 For the foregoing reasons, the State Bar respectfully petitions this Court to amend
3 Rules 45 and 84 of the Arizona Rules of Civil Procedure to conform with the forms set
4 forth in Exhibits "A" and "C" to this Petition.

5 RESPECTFULLY SUBMITTED this 10th day of December, 2009

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7 By

John A. Furlong
General Counsel

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10 Electronic copy filed with the
11 Clerk of the Supreme Court of Arizona
this 10th day of December, 2009

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13 Kathleen Lundgren
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Exhibit A

PROPOSED AMENDED RULE 45, Ariz. R. Civ. P.

1 **Rule 45. Subpoena**

2 **(a) Form; ~~issuance~~Issuance.**

3 (1) **General Requirements.** Every subpoena shall:

4 (A) state the name of the Arizona court from which it is issued;~~and~~

5 (B) state the title of the action, the name of the court in which it is
6 pending, and its civil action number;~~and~~

7 (C) command each person to whom it is directed to do the following at a
8 specified time and place:

9 (i) attend and give testimony ~~or to at a hearing, trial, or~~
10 deposition; or

11 (ii) produce and permit inspection, copying, testing, or sampling
12 of designated books, documents, electronically stored information, or tangible things in
13 that person's possession, custody or control of that person; or to

14 (iii) permit the inspection of premises; ~~at a time and place therein~~
15 specified; and

16 (D) ~~set forth the recipients' rights and obligations under the subpoena as~~
17 follows: be substantially in the form set forth in Rule 84, Form 9.

18 **Your Duties In Responding To This Subpoena**

19 ~~You have the duty to produce the documents requested as~~
20 ~~they are kept by you in the usual course of business, or you~~
21 ~~may organize the documents and label them to correspond~~
22 ~~with the categories set forth in this subpoena. See Rule~~
23 ~~45(d)(1) of the Arizona Rules of Civil Procedure.~~

24 ~~If this subpoena asks you to produce and permit inspection~~
25 ~~and copying of designated books, papers, documents, tangible~~
26 ~~things, or the inspection of premises, you need not appear to~~

1 ~~produce the items unless the subpoena states that you must~~
2 ~~appear for a deposition, hearing or trial. See Rule 45(e)(2)(A)~~
3 ~~of the Arizona Rules of Civil Procedure.~~

4 ~~Your Right To Object~~

5 ~~The party or attorney serving the subpoena has a duty to~~
6 ~~take reasonable steps to avoid imposing an undue burden or~~
7 ~~expense on you. The Superior Court enforces this duty and~~
8 ~~may impose sanctions upon the party or attorney serving the~~
9 ~~subpoena if this duty is breached. See Rule 45(e)(1) of the~~
10 ~~Arizona Rules of Civil Procedure.~~

11 ~~You may object to this subpoena if you feel that you~~
12 ~~should not be required to respond to the request(s) made. Any~~
13 ~~objection to this subpoena must be made within 14 days after~~
14 ~~it is served upon you, or before the time specified for~~
15 ~~compliance, by providing a written objection to the party or~~
16 ~~attorney serving the subpoena. See Rule 45(e)(2)(B) of the~~
17 ~~Arizona Rules of Civil Procedure.~~

18 ~~If you object because you claim the information requested~~
19 ~~is privileged or subject to protection as trial preparation~~
20 ~~material, you must express the objection clearly, and support~~
21 ~~each objection with a description of the nature of the~~
22 ~~document, communication or item not produced so that the~~
23 ~~demanding party can contest the claim. See Rule 45(d)(2) of~~
24 ~~the Arizona Rules of Civil Procedure.~~

25 ~~If you object to the subpoena in writing you do not need to~~
26 ~~comply with the subpoena until a court orders you to do so. It~~

1 ~~will be up to the party or attorney serving the subpoena to seek~~
2 ~~an order from the court to compel you to provide the~~
3 ~~documents or inspection requested, after providing notice to~~
4 ~~you. See Rule 45(c)(2)(B) of the Arizona Rules of Civil~~
5 ~~Procedure.~~

6 ~~If you are not a party to the litigation, or an officer of a~~
7 ~~party, the court will issue an order to protect you from any~~
8 ~~significant expense resulting from the inspection and copying~~
9 ~~commanded. See Rule 45(c)(2)(B) of the Arizona Rules of~~
10 ~~Civil Procedure.~~

11 ~~You also may file a motion in the superior court of the~~
12 ~~county in which the case is pending to quash or modify the~~
13 ~~subpoena if the subpoena:~~

14 ~~(i) does not provide a reasonable time for compliance;~~

15 ~~(ii) requires a non-party or officer of a party to travel to a~~
16 ~~county different from the county where the person resides or~~
17 ~~does business in person; or to travel to a county different from~~
18 ~~where the subpoena was served; or to travel to a place farther~~
19 ~~than 40 miles from the place of service; or to travel to a place~~
20 ~~different from any other convenient place fixed by an order of~~
21 ~~a court, except that a subpoena for you to appear and testify at~~
22 ~~trial can command you to travel from any place within the~~
23 ~~state;~~

24 ~~(iii) requires the disclosure of privileged or protected~~
25 ~~information and no waiver or exception applies; or~~

26 ~~(iv) subjects you to an undue burden. See Rule~~

1 45(c)(3)(A) of the Arizona Rules of Civil Procedure.

2 If this subpoena:

3 (i) ~~requires disclosure of a trade secret or other~~
4 ~~confidential research, development, or commercial trade~~
5 ~~information; or~~

6 (ii) ~~requires disclosure of an unretained expert's opinion or~~
7 ~~information not describing specific events or occurrences in~~
8 ~~dispute and resulting from the expert's study made not at the~~
9 ~~request of any party; or~~

10 (iii) ~~requires a person who is not a party or an officer~~
11 ~~of a party to incur substantial travel expense;~~

12 The court may either quash or modify the subpoena, or the
13 court may order you to appear or produce documents only
14 upon specified conditions, if the party who served the
15 subpoena shows a substantial need for the testimony or
16 material that cannot be otherwise met without undue hardship
17 and assures that you will be reasonably compensated. See

18 Rule 45(c)(3)(B) of the Arizona Rules of Civil Procedure.

19 A ~~command to produce evidence or to permit inspection, copying, testing, or~~
20 ~~sampling, may be joined with a command to appear at trial or hearing or at deposition or~~
21 ~~may be issued separately. A subpoena may specify the form or forms in which~~
22 ~~electronically stored information is to be produced.~~

23 (2) ~~A subpoena commanding attendance at a trial or hearing shall issue from the~~
24 ~~superior court for the county in which the hearing or trial is to be held. A subpoena for~~
25 ~~attendance at a deposition shall issue from the superior court for the county in which the~~
26 ~~case is pending. If separate from a subpoena commanding the attendance of a person, a~~

1 subpoena for production, inspection, copying, testing, or sampling shall issue from the
2 superior court for the county in which the production or inspection is to be made.

3 ~~(3)~~(2) Issuance by Clerk. The clerk shall issue a signed but otherwise blank
4 subpoena to a party requesting it, and that party shall complete the subpoena before
5 service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk
6 through an online subpoena issuance service approved by the Supreme Court of Arizona.

7 **~~(b)~~ — Service**

8 (1) — A subpoena may be served by any person who is not a party and is not less
9 than eighteen years of age. Service of a subpoena upon a person named therein shall be
10 made by delivering a copy thereof to such person and if the person's attendance is
11 commanded, by tendering to that person the fees for one day's attendance and the mileage
12 allowed by law.

13 (2) — When the subpoena commands the appearance of a party at a trial or
14 hearing, or is issued on behalf of the state or an officer or agency thereof, fees and
15 mileage need not be tendered.

16 (3) — Copies of all subpoenas shall be served on each party.

17 (4) — A subpoena may be served anywhere within the state.

18 (5) — Proof of service when necessary shall be made by filing with the clerk of the
19 court of the county in which the case is pending a statement of the date and manner of
20 service and of the names of the persons served, certified by the person who made service.

21 **(b) For Attendance of Witnesses at Hearing, Trial or Deposition; Objections.**

22 (1) Issuing Court. A subpoena commanding a person to attend and give
23 testimony at a hearing or trial shall issue from the superior court for the county in which
24 the hearing or trial is to be held. A subpoena commanding a person to attend and give
25 testimony at a deposition shall issue from the superior court for the county in which the
26 case is pending.

1 (2) Combining or Separating a Command to Produce or to Permit Inspection.
2 A command to produce documents, electronically stored information, or tangible things,
3 or to permit the inspection of premises, may be joined with a command to attend and give
4 testimony at a hearing, trial, or deposition, or may be set out in a separate subpoena.

5 (3) Place of Appearance.

6 (A) Trial Subpoena. Subject to Rule 45(e)(2)(B)(iii), a subpoena
7 commanding a person to attend and give testimony at a trial may require the subpoenaed
8 person to travel from anywhere within the state.

9 (B) Hearing or Deposition Subpoena. A subpoena commanding a person
10 who is neither a party nor a party's officer to attend and give testimony at a hearing or
11 deposition may not require the subpoenaed person to travel to a place other than:

12 (i) the county in which the person resides or transacts business in
13 person;

14 (ii) the county in which the person is served with a subpoena, or
15 within forty miles from the place of service; or

16 (iii) such other convenient place fixed by a court order.

17 (4) Command to Attend a Deposition—Notice of Recording Method. A
18 subpoena commanding a person to attend and give testimony at a deposition shall state the
19 method for recording the testimony.

20 (5) Objections; Appearance Required. Objections to a subpoena commanding
21 a person to attend and give testimony at a hearing, trial, or deposition shall be made by
22 timely motion in accordance with Rule 45(e)(2). Unless excused from doing so by the
23 party or attorney serving a subpoena, by a court order, or by any other provision of this
24 Rule, a person who is properly served with a subpoena is required to attend and give
25 testimony at the date, time and place specified in the subpoena.

26

1 **(c) — Protection of Persons Subject to Subpoenas**

2 (1) — ~~A party or an attorney responsible for the service of a subpoena shall take~~
3 ~~reasonable steps to avoid imposing undue burden or expense on a person subject to that~~
4 ~~subpoena. The superior court of the county where the subpoena was issued shall enforce~~
5 ~~this duty and impose upon the party or attorney in breach of this duty an appropriate~~
6 ~~sanction, which may include, but is not limited to, lost earnings and a reasonable~~
7 ~~attorneys' fee.~~

8 (2)(A) — ~~A person commanded to produce and permit inspection, copying,~~
9 ~~testing, or sampling of designated books, papers, documents, electronically stored~~
10 ~~information or tangible things, or inspection of premises need not appear in person at the~~
11 ~~place of production or inspection unless commanded to appear for deposition, hearing or~~
12 ~~trial.~~

13 (B) — ~~Subject to paragraph (d)(2) of this rule, a person commanded to~~
14 ~~produce and permit inspection, copying, testing, or sampling may, within 14 days after~~
15 ~~service of the subpoena or before the time specified for compliance if such time is less~~
16 ~~than 14 days after service, serve upon the party or attorney designated in the subpoena~~
17 ~~written objection to producing any or all of the designated materials or inspection of the~~
18 ~~premises or to producing electronically stored information in the form or forms~~
19 ~~requested. If objection is made, the party serving the subpoena shall not be entitled to~~
20 ~~inspect, copy, test, or sample the materials except pursuant to an order of the court by~~
21 ~~which the subpoena was issued. If objection has been made, the party serving the~~
22 ~~subpoena may, upon notice to the person commanded to produce, move at any time for an~~
23 ~~order to compel the production, inspection, copying, testing, or sampling. Such an order to~~
24 ~~compel shall protect any person who is not a party or an officer of a party from undue~~
25 ~~burden or expense resulting from the inspection, copying, testing, or sampling~~
26 ~~commanded.~~

1 ~~(3)(A) — On timely motion, the superior court of the county in which the case~~
2 ~~is pending or from which a subpoena was issued shall quash or modify the subpoena if it~~
3 ~~(i) — fails to allow reasonable time for compliance;~~
4 ~~(ii) — requires a person who is not a party or an officer of a party to~~
5 ~~travel to a place other than the county in which the person resides or transacts business in~~
6 ~~person or is served with a subpoena, or within forty miles from the place of service, or~~
7 ~~such other convenient place fixed by an order of court, except that, subject to the~~
8 ~~provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be~~
9 ~~commanded to travel from any such place within the state, or~~
10 ~~(iii) — requires disclosure of privileged or other protected matter and~~
11 ~~no exception or waiver applies, or~~
12 ~~(iv) — subjects a person to undue burden.~~
13 ~~(B) — If a subpoena~~
14 ~~(i) — requires disclosure of a trade secret or other confidential~~
15 ~~research, development, or commercial information, or~~
16 ~~(ii) — requires disclosure of an unretained expert's opinion or~~
17 ~~information not describing specific events or occurrences in dispute and resulting from the~~
18 ~~expert's study made not at the request of any party, or~~
19 ~~(iii) — requires a person who is not a party or an officer of a party to~~
20 ~~incur substantial travel expense.~~
21 ~~The court may, to protect a person subject to or affected by the subpoena, quash or~~
22 ~~modify the subpoena or, if the party in whose behalf the subpoena is issued shows a~~
23 ~~substantial need for the testimony or material that cannot be otherwise met without undue~~
24 ~~hardship and assures that the person to whom the subpoena is addressed will be~~
25 ~~reasonably compensated, the court may order appearance or production only upon~~
26 ~~specified conditions.~~

1 (c) For Production of Documentary Evidence or for Inspection of Premises;
2 Duties in Responding to Subpoena; Objections; Production to Other Parties.

3 (1) Issuing Court. If separate from a subpoena commanding a person to attend
4 and give testimony at a hearing, trial or deposition, a subpoena commanding a person to
5 produce designated documents, electronically stored information or tangible things, or to
6 permit the inspection of premises, shall issue from the superior court for the county in
7 which the production or inspection is to be made.

8 (2) Specifying the Form for Electronically Stored Information. A subpoena
9 may specify the form or forms in which electronically stored information is to be
10 produced.

11 (3) Appearance Not Required. A person commanded to produce documents,
12 electronically stored information or tangible things, or to permit the inspection of
13 premises, need not appear in person at the place of production or inspection unless the
14 subpoena commands the person to attend and give testimony at a hearing, trial or
15 deposition.

16 (4) Production of Documents. A person responding to a subpoena to produce
17 documents shall produce them as they are kept in the usual course of business or shall
18 organize and label them to correspond with the categories in the demand.

19 (5) Objections.

20 (A) Form and Time for Objection.

21 (i) A person commanded to produce documents, electronically
22 stored information or tangible items, or to permit the inspection of premises, may serve
23 upon the party or attorney serving the subpoena a good faith written objection to
24 producing, inspecting, copying, testing or sampling any or all of the designated materials;
25 to inspecting the premises; or to producing electronically stored information in the form or
26 forms requested. A written objection shall set forth the basis for the objection, and shall

1 include the name, address, and telephone number of the person, or the person's attorney,
2 serving the objection.

3 (ii) The objection shall be served upon the party or attorney
4 serving the subpoena before the time specified for compliance or within 14 days after the
5 subpoena is served, whichever is earlier.

6 (iii) An objection also may be made to that portion of a subpoena
7 that commands the person to produce and permit inspection, copying, testing, or sampling
8 if it is joined with a command to attend and give testimony at a hearing, trial or
9 deposition, but making such an objection does not suspend or modify a person's
10 obligation to attend and give testimony at the date, time and place specified in the
11 subpoena.

12 (B) Procedure After an Objection Is Made.

13 (i) If an objection is made, the party or attorney serving the
14 subpoena shall not be entitled to compliance with those portions of the subpoena that are
15 subject to the objection, except pursuant to an order of the issuing court.

16 (ii) The party serving the subpoena may move for an order under
17 Rule 37(a) to compel compliance with the subpoena. The motion shall comply with Rule
18 37(a)(2)(C), and shall be served on the subpoenaed person and all other parties in
19 accordance with Rule 5(c).

20 (iii) Any order to compel entered by the court shall protect any
21 person who is neither a party nor a party's officer from undue burden or expense resulting
22 from the production, inspection, copying, testing, or sampling commanded.

23 ~~(d) — Duties in Responding to Subpoena~~

24 ~~(1) — A person responding to a subpoena to produce documents shall produce~~
25 ~~them as they are kept in the usual course of business or shall organize and label them to~~
26 ~~correspond with the categories in the demand.~~

1 (C) Claiming Privilege or Protection.

2 (2)(A)(i) When information subject to a subpoena is withheld on
3 a claim that it is privileged or subject to protection as trial-preparation materials, the claim
4 shall be made expressly and shall be supported by a description of the nature of the
5 documents, communications, or things not produced that is sufficient to enable the
6 demanding party to contest the claim.

7 (B)(ii) If a person contends that information that is subject to a
8 claim of privilege or of protection as trial-preparation material has been inadvertently
9 produced in response to a subpoena, the person making the claim may notify any party
10 that received the information of the claim and the basis for it. After being notified, a party
11 must promptly return, sequester, or destroy the specified information and any copies it has
12 and may not use or disclose the information until the claim is resolved. A receiving party
13 may promptly present the information to the court under seal for a determination of the
14 claim. If the receiving party disclosed the information before being notified, it must take
15 reasonable steps to retrieve it. The person who produced the information must preserve
16 the information until the claim is resolved.

17 (6) Production to Other Parties. Unless otherwise stipulated by the parties or
18 ordered by the court, documents, electronically stored information and tangible things that
19 are obtained in response to a subpoena shall be made available to all other parties in
20 accordance with Rule 26.1(a) and (b).

21 (d) Service.

22 (1) General Requirements; Tendering Fees. A subpoena may be served by
23 any person who is not a party and is not less than eighteen years of age. Serving a
24 subpoena requires delivering a copy to the named person and, if the subpoena requires
25 that person's attendance, tendering to that person the fees for one day's attendance and the
26 mileage allowed by law.

1 (2) *Exceptions to Tendering Fees.* When the subpoena commands the
2 appearance of a party at a trial or hearing, or is issued on behalf of the state or any of its
3 officers or agencies, fees and mileage need not be tendered.

4 (3) *Service on Other Parties.* A copy of every subpoena shall be served on
5 every other party in accordance with Rule 5(c).

6 (4) *Service within the State.* A subpoena may be served anywhere within the
7 state.

8 (5) *Proof of Service.* Proving service, when necessary, requires filing with the
9 clerk of the court of the county in which the case is pending a statement showing the date
10 and manner of service and of the names of the persons served. The statement must be
11 certified by the person who served the subpoena.

12 ~~(e) **Contempt.** Failure of any person without adequate excuse to obey a subpoena~~
13 ~~served upon that person may be deemed a contempt of the superior court of the county~~
14 ~~from which the subpoena issued. An adequate cause for failure to obey exists when a~~
15 ~~subpoena purports to require a non-party to attend or produce at a place not within the~~
16 ~~limits provided by clause (ii) of subparagraph (e)(3).~~

17 **(e) Protection of Persons Subject to Subpoenas; Motion to Quash or Modify**

18 (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or an attorney
19 responsible for the service of a subpoena shall take reasonable steps to avoid imposing
20 undue burden or expense on a person subject to that subpoena. The issuing court shall
21 enforce this duty and impose upon the party or attorney who breaches this duty an
22 appropriate sanction, which may include, but is not limited to, lost earnings and a
23 reasonable attorneys' fee.

24 (2) *Quashing or Modifying a Subpoena.*

25 (A) *When Required.* On the timely filing of a motion to quash or modify
26 a subpoena, the superior court of the county in which the case is pending or from which a

1 subpoena was issued shall quash or modify the subpoena if:

2 (i) it fails to allow a reasonable time for compliance;

3 (ii) it commands a person who is neither a party nor a party's
4 officer to travel to a location other than the places specified in Rule 45(b)(3)(B);

5 (iii) it requires disclosure of privileged or other protected matter, if
6 no exception or waiver applies; or

7 (iv) it subjects a person to undue burden.

8 (B) When Permitted. On the timely filing of a motion to quash or modify
9 a subpoena, and to protect a person subject to or affected by a subpoena, the superior court
10 of the county in which the case is pending or from which a subpoena was issued may
11 quash or modify the subpoena if:

12 (i) it requires disclosing a trade secret or other confidential
13 research, development, or commercial information;

14 (ii) it requires disclosing an unretained expert's opinion or
15 information that does not describe specific occurrences in dispute and results from the
16 expert's study that was not requested by a party;

17 (iii) it requires a person who is neither a party nor a party's officer
18 to incur substantial travel expense; or

19 (iv) justice so requires.

20 (C) Specifying Conditions as an Alternative. In the circumstances
21 described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a
22 subpoena, order appearance or production under specified conditions, including any
23 conditions and limitations set forth in Rule 26(c), as the court deems appropriate:

24 (i) if the party or attorney serving the subpoena shows a
25 substantial need for the testimony or material that cannot be otherwise met without undue
26 hardship; and

1 (ii) if the person's travel expenses or the expenses resulting from
2 the production are at issue, the party or attorney serving the subpoena assures that the
3 subpoenaed person will be reasonably compensated.

4 (D) Time for Motion. A motion to quash or modify a subpoena must be
5 filed before the time specified for compliance or within 14 days after the subpoena is
6 served, whichever is earlier.

7 (E) Service of Motion. Any motion to quash or modify a subpoena shall
8 be served on the party or the attorney serving the subpoena in accordance with Rule 5(c).
9 The party or attorney who served the subpoena shall serve a copy of any such motion on
10 all other parties in accordance with Rule 5(c).

11 ~~(f) **Failure to Produce Documentary Evidence.** Upon failure to produce~~
12 ~~documentary evidence as provided in this Rule, secondary evidence of the books, papers,~~
13 ~~documents or tangible things may be given at trial.~~

14 **(f) Contempt.** The issuing court may hold in contempt a person, who having been
15 served, fails without adequate excuse to obey a subpoena. A failure to obey must be
16 excused if the subpoena purports to require a person who is neither a party nor a party's
17 officer to attend or produce at a location other than the places specified in Rule
18 45(b)(3)(B).

19 ~~(g) **ADA Notification.** The subpoena shall state that "Requests for reasonable~~
20 ~~accommodation for persons with disabilities must be made to the court by parties at least~~
21 ~~3 working days in advance of a scheduled court proceeding."~~

22 **(g) Failure to Produce Evidence.** If a person fails to produce a document,
23 electronically stored information, or a tangible thing requested in a subpoena, secondary
24 evidence of the item's content may be offered in evidence at trial.

25

26

Exhibit B

PROPOSED AMENDED RULE 45, Ariz. R. Civ. P.

1 **Rule 45. Subpoena**

2 **(a) Form; Issuance.**

3 (1) **General Requirements.** Every subpoena shall:

4 (A) state the name of the Arizona court from which it is issued;

5 (B) state the title of the action, the name of the court in which it is
6 pending, and its civil action number;

7 (C) command each person to whom it is directed to do the following at a
8 specified time and place:

9 (i) attend and give testimony at a hearing, trial, or deposition; or

10 (ii) produce and permit inspection, copying, testing, or sampling
11 of designated documents, electronically stored information, or tangible things in that
12 person's possession, custody or control; or

13 (iii) permit the inspection of premises; and

14 (D) be substantially in the form set forth in Rule 84, Form 9.

15 (2) **Issuance by Clerk.** The clerk shall issue a signed but otherwise blank
16 subpoena to a party requesting it, and that party shall complete the subpoena before
17 service. The State Bar of Arizona may also issue signed subpoenas on behalf of the clerk
18 through an online subpoena issuance service approved by the Supreme Court of Arizona.

19 **(b) For Attendance of Witnesses at Hearing, Trial or Deposition; Objections.**

20 (1) **Issuing Court.** A subpoena commanding a person to attend and give
21 testimony at a hearing or trial shall issue from the superior court for the county in which
22 the hearing or trial is to be held. A subpoena commanding a person to attend and give
23 testimony at a deposition shall issue from the superior court for the county in which the
24 case is pending.

25 (2) **Combining or Separating a Command to Produce or to Permit Inspection.**
26 A command to produce documents, electronically stored information, or tangible things,

1 or to permit the inspection of premises, may be joined with a command to attend and give
2 testimony at a hearing, trial, or deposition, or may be set out in a separate subpoena.

3 (3) ***Place of Appearance.***

4 (A) *Trial Subpoena.* Subject to Rule 45(e)(2)(B)(iii), a subpoena
5 commanding a person to attend and give testimony at a trial may require the subpoenaed
6 person to travel from anywhere within the state.

7 (B) *Hearing or Deposition Subpoena:* A subpoena commanding a person
8 who is neither a party nor a party's officer to attend and give testimony at a hearing or
9 deposition may not require the subpoenaed person to travel to a place other than:

10 (i) the county in which the person resides or transacts business in
11 person;

12 (ii) the county in which the person is served with a subpoena, or
13 within forty miles from the place of service; or

14 (iii) such other convenient place fixed by a court order.

15 (4) ***Command to Attend a Deposition—Notice of Recording Method.*** A
16 subpoena commanding a person to attend and give testimony at a deposition shall state the
17 method for recording the testimony.

18 (5) ***Objections; Appearance Required.*** Objections to a subpoena commanding
19 a person to attend and give testimony at a hearing, trial, or deposition shall be made by
20 timely motion in accordance with Rule 45(e)(2). Unless excused from doing so by the
21 party or attorney serving a subpoena, by a court order, or by any other provision of this
22 Rule, a person who is properly served with a subpoena is required to attend and give
23 testimony at the date, time and place specified in the subpoena.

24 (c) **For Production of Documentary Evidence or for Inspection of Premises;**
25 **Duties in Responding to Subpoena; Objections; Production to Other Parties.**

26

1 (1) ***Issuing Court.*** If separate from a subpoena commanding a person to attend
2 and give testimony at a hearing, trial or deposition, a subpoena commanding a person to
3 produce designated documents, electronically stored information or tangible things, or to
4 permit the inspection of premises, shall issue from the superior court for the county in
5 which the production or inspection is to be made.

6 (2) ***Specifying the Form for Electronically Stored Information.*** A subpoena
7 may specify the form or forms in which electronically stored information is to be
8 produced.

9 (3) ***Appearance Not Required.*** A person commanded to produce documents,
10 electronically stored information or tangible things, or to permit the inspection of
11 premises, need not appear in person at the place of production or inspection unless the
12 subpoena commands the person to attend and give testimony at a hearing, trial or
13 deposition.

14 (4) ***Production of Documents.*** A person responding to a subpoena to produce
15 documents shall produce them as they are kept in the usual course of business or shall
16 organize and label them to correspond with the categories in the demand.

17 (5) ***Objections.***

18 (A) ***Form and Time for Objection.***

19 (i) A person commanded to produce documents, electronically
20 stored information or tangible items, or to permit the inspection of premises, may serve
21 upon the party or attorney serving the subpoena a good faith written objection to
22 producing, inspecting, copying, testing or sampling any or all of the designated materials;
23 to inspecting the premises; or to producing electronically stored information in the form or
24 forms requested. A written objection shall set forth the basis for the objection, and shall
25 include the name, address, and telephone number of the person, or the person's attorney,
26 serving the objection.

1 (ii) The objection shall be served upon the party or attorney
2 serving the subpoena before the time specified for compliance or within 14 days after the
3 subpoena is served, whichever is earlier.

4 (iii) An objection also may be made to that portion of a subpoena
5 that commands the person to produce and permit inspection, copying, testing, or sampling
6 if it is joined with a command to attend and give testimony at a hearing, trial or
7 deposition, but making such an objection does not suspend or modify a person's
8 obligation to attend and give testimony at the date, time and place specified in the
9 subpoena.

10 (B) *Procedure After an Objection Is Made.*

11 (i) If an objection is made, the party or attorney serving the
12 subpoena shall not be entitled to compliance with those portions of the subpoena that are
13 subject to the objection, except pursuant to an order of the issuing court.

14 (ii) The party serving the subpoena may move for an order under
15 Rule 37(a) to compel compliance with the subpoena. The motion shall comply with Rule
16 37(a)(2)(C), and shall be served on the subpoenaed person and all other parties in
17 accordance with Rule 5(c).

18 (iii) Any order to compel entered by the court shall protect any
19 person who is neither a party nor a party's officer from undue burden or expense resulting
20 from the production, inspection, copying, testing, or sampling commanded.

21 (C) *Claiming Privilege or Protection.*

22 (i) When information subject to a subpoena is withheld on a
23 claim that it is privileged or subject to protection as trial-preparation materials, the claim
24 shall be made expressly and shall be supported by a description of the nature of the
25 documents, communications, or things not produced that is sufficient to enable the
26 demanding party to contest the claim.

1 (ii) If a person contends that information that is subject to a claim
2 of privilege or of protection as trial-preparation material has been inadvertently produced
3 in response to a subpoena, the person making the claim may notify any party that received
4 the information of the claim and the basis for it. After being notified, a party must
5 promptly return, sequester, or destroy the specified information and any copies it has and
6 may not use or disclose the information until the claim is resolved. A receiving party may
7 promptly present the information to the court under seal for a determination of the claim.
8 If the receiving party disclosed the information before being notified, it must take
9 reasonable steps to retrieve it. The person who produced the information must preserve
10 the information until the claim is resolved.

11 (6) ***Production to Other Parties.*** Unless otherwise stipulated by the parties or
12 ordered by the court, documents, electronically stored information and tangible things that
13 are obtained in response to a subpoena shall be made available to all other parties in
14 accordance with Rule 26.1(a) and (b).

15 **(d) Service.**

16 (1) ***General Requirements; Tendering Fees.*** A subpoena may be served by
17 any person who is not a party and is not less than eighteen years of age. Serving a
18 subpoena requires delivering a copy to the named person and, if the subpoena requires
19 that person's attendance, tendering to that person the fees for one day's attendance and the
20 mileage allowed by law.

21 (2) ***Exceptions to Tendering Fees.*** When the subpoena commands the
22 appearance of a party at a trial or hearing, or is issued on behalf of the state or any of its
23 officers or agencies, fees and mileage need not be tendered.

24 (3) ***Service on Other Parties.*** A copy of every subpoena shall be served on
25 every other party in accordance with Rule 5(c).

26

1 (4) *Service within the State.* A subpoena may be served anywhere within the
2 state.

3 (5) *Proof of Service.* Proving service, when necessary, requires filing with the
4 clerk of the court of the county in which the case is pending a statement showing the date
5 and manner of service and of the names of the persons served. The statement must be
6 certified by the person who served the subpoena.

7 **(e) Protection of Persons Subject to Subpoenas; Motion to Quash or Modify**

8 (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or an attorney
9 responsible for the service of a subpoena shall take reasonable steps to avoid imposing
10 undue burden or expense on a person subject to that subpoena. The issuing court shall
11 enforce this duty and impose upon the party or attorney who breaches this duty an
12 appropriate sanction, which may include, but is not limited to, lost earnings and a
13 reasonable attorneys' fee.

14 (2) *Quashing or Modifying a Subpoena.*

15 (A) *When Required.* On the timely filing of a motion to quash or modify
16 a subpoena, the superior court of the county in which the case is pending or from which a
17 subpoena was issued shall quash or modify the subpoena if:

- 18 (i) it fails to allow a reasonable time for compliance;
- 19 (ii) it commands a person who is neither a party nor a party's
20 officer to travel to a location other than the places specified in Rule 45(b)(3)(B);
- 21 (iii) it requires disclosure of privileged or other protected matter, if
22 no exception or waiver applies; or
- 23 (iv) it subjects a person to undue burden.

24 (B) *When Permitted.* On the timely filing of a motion to quash or modify
25 a subpoena, and to protect a person subject to or affected by a subpoena, the superior court
26 of the county in which the case is pending or from which a subpoena was issued may

1 quash or modify the subpoena if:

2 (i) it requires disclosing a trade secret or other confidential
3 research, development, or commercial information;

4 (ii) it requires disclosing an unretained expert's opinion or
5 information that does not describe specific occurrences in dispute and results from the
6 expert's study that was not requested by a party;

7 (iii) it requires a person who is neither a party nor a party's officer
8 to incur substantial travel expense; or

9 (iv) justice so requires.

10 (C) *Specifying Conditions as an Alternative.* In the circumstances
11 described in Rule 45(e)(2)(B), the court may, instead of quashing or modifying a
12 subpoena, order appearance or production under specified conditions, including any
13 conditions and limitations set forth in Rule 26(c), as the court deems appropriate:

14 (i) if the party or attorney serving the subpoena shows a
15 substantial need for the testimony or material that cannot be otherwise met without undue
16 hardship; and

17 (ii) if the person's travel expenses or the expenses resulting from
18 the production are at issue, the party or attorney serving the subpoena assures that the
19 subpoenaed person will be reasonably compensated.

20 (D) *Time for Motion.* A motion to quash or modify a subpoena must be
21 filed before the time specified for compliance or within 14 days after the subpoena is
22 served, whichever is earlier.

23 (E) *Service of Motion.* Any motion to quash or modify a subpoena shall
24 be served on the party or the attorney serving the subpoena in accordance with Rule 5(c).
25 The party or attorney who served the subpoena shall serve a copy of any such motion on
26 all other parties in accordance with Rule 5(c).

1 **(f) Contempt.** The issuing court may hold in contempt a person, who having been
2 served, fails without adequate excuse to obey a subpoena. A failure to obey must be
3 excused if the subpoena purports to require a person who is neither a party nor a party's
4 officer to attend or produce at a location other than the places specified in
5 Rule 45(b)(3)(B).

6 **(g) Failure to Produce Evidence.** If a person fails to produce a document,
7 electronically stored information, or a tangible thing requested in a subpoena, secondary
8 evidence of the item's content may be offered in evidence at trial.

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Exhibit C

PROPOSED FORM OF SUBPOENA
Rule 84, Ariz. R. Civ. P., Form 9

1 Name:
Address:
2 City:
State:
3 Phone:

4 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
5 IN AND FOR THE COUNTY OF _____
6

7 Plaintiff _____

8 vs.

9 Defendant _____
10 _____
11 _____

} Case No.:

} **SUBPOENA IN A CIVIL CASE**
}

12 **TO:** _____
(Name of Recipient)

13 [Select one or more of the following, as appropriate:]

14 ☐ **For Attendance at Hearing or Trial**

15 **YOU ARE COMMANDED** to appear in the Superior Court of the State of
16 Arizona, in and for the County of _____, at the place, date and time
specified below to testify at ☐ a hearing ☐ trial in the above cause:

17 Judicial Officer:
18 Courtroom:
19 Address:
Date:
Time:

20
21 ☐ **For Taking of Depositions**

22 **YOU ARE COMMANDED** to appear at the place, date and time specified below
23 to testify at the taking of a deposition in the above cause:

24 Place of Deposition:
Address:
25 Date:
Time:
26 Method of Recording:

1 ☐ **For Production of Documentary Evidence or Inspection of Premises**

2 **YOU ARE COMMANDED**, to produce and permit inspection, copying, testing,
3 or sampling of the following designated documents, electronically stored
information or tangible things, or to permit the inspection of premises:

4 [designation of documents, electronically stored information or tangible
things, or the location of the premises to be inspected]

5 at the place, date, and time specified below:

6 Place of Production or Inspection:

7 Address:

8 Date:

Time:

9 [The following text must be included in every subpoena:]

10 **Your Duties in Responding To This Subpoena**

11 ***Attendance at a Trial.*** If this subpoena commands you to appear at a trial, you
12 must appear at the place, date and time designated in the subpoena unless you file a timely
motion with the court and the court quashes or modifies the subpoena. *See* Rule 45(b)(5)
13 and Rule 45(e)(2) of the Arizona Rules of Civil Procedure. *See also* "Your Right To
Object To This Subpoena" section below. Unless a court orders otherwise, you are
14 required to travel to any part of the state to attend and give testimony at a trial. *See* Rule
45(b)(3)(A) of the Arizona Rules of Civil Procedure.

15 ***Attendance at a Hearing or Deposition.*** If this subpoena commands you to appear
16 at a hearing or deposition, you must appear at the place, date and time designated in this
subpoena unless either: (1) you file a timely motion with the court and the court quashes
17 or modifies the subpoena; or (2) you are not a party or a party's officer and this subpoena
commands you to travel to a place other than: (a) the county in which you reside or you
18 transact business in person; or (b) the county in which you were served with the subpoena
or within forty (40) miles from the place of service; or (c) such other convenient place
19 fixed by a court order. *See* Rule 45(b)(3)(B) and Rule 45(e)(2)(A)(ii) of the Arizona
Rules of Civil Procedure. *See also* "Your Right To Object To This Subpoena" section
below.

20 ***Production of Documentary Evidence or Inspection of Premises.*** If this subpoena
21 commands you to produce and permit inspection, copying, testing or sampling of
designated documents, electronically stored information, or tangible things, you must
22 make the items available at the place, date and time designated in this subpoena, and in
the case of electronically stored information, in the form or forms requested, unless you
23 provide a good faith written objection to the party or attorney who served the subpoena.
See Rule 45(c)(5) of the Arizona Rules of Civil Procedure. *See also* "Your Right To
24 Object To This Subpoena" section below. Similarly, if this subpoena commands you to
make certain premises available for inspection, you must make the designated premises
25 available for inspection on the date and time designated in this subpoena unless you
provide a good faith written objection to the party or attorney who served the subpoena.
26

1 See Rule 45(c)(5) of the Arizona Rules of Civil Procedure. See also "Your Right to
Object to This Subpoena" section below.

2
3 You should note that a command to produce certain designated materials, or to
4 permit the inspection of premises, *may* be combined with a command to appear at a trial,
5 hearing or deposition. See Rule 45(b)(2) of the Arizona Rules of Civil Procedure. You
do not, however, need to appear in person at the place of production or inspection unless
the subpoena *also* states that you must appear for and give testimony at a hearing, trial or
deposition. See Rule 45(c)(3) of the Arizona Rules of Civil Procedure.

6 If the subpoena commands you to produce documents, you have the duty to
7 produce the designated documents as they are kept by you in the usual course of business,
or you may organize the documents and label them to correspond with the categories set
forth in the subpoena. See Rule 45(c)(4) of the Arizona Rules of Civil Procedure.

8 **Your Right To Object To This Subpoena**

9
10 **Generally.** If you have concerns or questions about this subpoena, you should first
11 contact the party or attorney who served the subpoena. The party or attorney serving the
12 subpoena has a duty to take reasonable steps to avoid imposing an undue burden or
expense on you. The superior court enforces this duty and may impose sanctions upon the
party or attorney serving the subpoena if this duty is breached. See Rule 45(e)(1) of the
Arizona Rules of Civil Procedure.

13 **Procedure for Objecting to a Subpoena for Attendance at a Hearing, Trial or**
14 **Deposition.** If you wish to object to a subpoena commanding your appearance at a
15 hearing, trial or deposition, you must file a motion to quash or modify the subpoena with
the court to obtain a court order excusing you from complying with this subpoena. See
16 Rules 45(b)(5) and 45(e)(2) of the Arizona Rules of Civil Procedure. The motion must be
17 filed in the superior court of the county in which the case is pending or in the superior
18 court of the county from which the subpoena was issued. See Rule 45(e)(2)(A) and (B) of
the Arizona Rules of Civil Procedure. The motion must be filed before the time specified
for compliance or within 14 days after the subpoena is served, whichever is earlier. See
Rule 45(e)(2)(D) of the Arizona Rules of Civil Procedure. You must send a copy of any
motion to quash or modify the subpoena to the party or attorney who served the subpoena.
See Rules 45(e)(2)(E) of the Arizona Rules of Civil Procedure.

19 The court *must* quash or modify a subpoena:

- 20 (1) if the subpoena does not provide a reasonable time for compliance;
- 21 (2) unless the subpoena commands your attendance at a trial, if you are
22 not a party or a party's officer and if the subpoena commands you to
23 travel to a place other than: (a) the county in which you reside or
24 transact business in person; (b) the county in which you were served
with a subpoena, or within forty (40) miles from the place of service;
or (c) such other convenient place fixed by a court order; or
- 25 (3) if the subpoena requires disclosure of privileged or other protected
26 matter, if no exception or waiver applies; or

1 (4) if the subpoena subjects you to undue burden.

2 See Rule 45(e)(2)(A) of the Arizona Rules of Civil Procedure.

3 The court *may* quash or modify a subpoena:

- 4 (1) if the subpoena requires you to disclose a trade secret or other
confidential research, development or commercial information;
- 5 (2) if you are an unretained expert and the subpoena requires you to
6 disclose your opinion or information resulting from your study that
7 you have not been requested by any party to give on matters that are
specific to the dispute;
- 8 (3) if you are not a party or a party's officer and the subpoena would
require you to incur substantial travel expense; or
- 9 (4) if the court determines that justice requires the subpoena to be
10 quashed or modified.

11 See Rule 45(e)(2)(B) of the Arizona Rules of Civil Procedure.

12 In these last four circumstances, a court may, instead of quashing or modifying a
13 subpoena, order your appearance or order the production of material under specified
14 conditions if: (1) the serving party or attorney shows a substantial need for the testimony
or material that cannot be otherwise met without undue hardship; and (2) if your travel
15 expenses or the expenses resulting from the production are at issue, the court ensures that
you will be reasonably compensated. See Rule 45(e)(2)(C) of the Arizona Rules of Civil
Procedure.

16 ***Procedure for Objecting to Subpoena For Production of Documentary Evidence.***
17 If you wish to object to a subpoena commanding you to produce documents, electronically
18 stored information or tangible items, or to permit the inspection of premises, you may
send a good faith written objection to the party or attorney serving the subpoena that
19 objects to: (1) producing, inspecting, copying, testing or sampling any or all of the
materials designated in the subpoena; (2) inspecting the premises; or (3) producing
20 electronically stored information in the form or forms requested. You must send your
written objection to the party or attorney who served the subpoena before the time
specified for compliance or within 14 days after the subpoena is served, whichever is
earlier. See Rule 45(c)(5)(A)(ii) of the Arizona Rules of Civil Procedure.

21 If you object because you claim the information requested is privileged, protected,
22 or subject to protection as trial preparation material, you must express the objection
clearly, and support each objection with a description of the nature of the document,
23 communication or item not produced so that the demanding party can contest the claim.
See Rule 45(c)(5)(C) of the Arizona Rules of Civil Procedure.

24 If you object to the subpoena in writing you do not need to comply with the
25 subpoena until a court orders you to do so. It will be up to the party or attorney serving
the subpoena to first personally consult with you and engage in good faith efforts to
26 resolve your objection and, if the objection cannot be resolved, to seek an order from the

1 court to compel you to provide the documents or inspection requested, after providing
notice to you. See Rule 45(c)(5)(B) of the Arizona Rules of Civil Procedure.

2
3 If you are not a party to the litigation, or a party's officer, the court will issue an
order to protect you from any significant expense resulting from the inspection and
copying commanded. See Rule 45(c)(6)(B) of the Arizona Rules of Civil Procedure.

4
5 Instead of sending a written objection to the party or attorney who served the
subpoena, you also have the option of raising your objections in a motion to quash or
modify the subpoena. See Rule 45(e)(2) of the Arizona Rules for Civil Procedure. The
6 procedure and grounds for doing so are described in the section above entitled "Procedure
for Objecting to a Subpoena for Attendance at a Hearing, Trial or Deposition."

7
8 If the subpoena *also* commands your attendance at a hearing, trial or deposition,
sending a written objection to the party or attorney who served the subpoena does not
suspend or modify your obligation to attend and give testimony at the date, time and place
9 specified in the subpoena. See Rule 45(c)(5)(A)(iii) of the Arizona Rules of Civil
Procedure. If you wish to object to the portion of this subpoena requiring your attendance
10 at a hearing, trial or deposition, you must file a motion to quash or modify the subpoena as
described in the section above entitled "Procedure for Objecting to a Subpoena for
11 Attendance at a Hearing, Trial or Deposition." See Rule 45(b)(5) and 45(c)(5)(iii) of the
Arizona Rules of Civil Procedure.

12 ADA Notification

13
14 Requests for reasonable accommodation for persons with disabilities must be made
to the court by parties at least 3 working days in advance of a scheduled court proceeding.

15 [Optional: this form may include the provisions of Rule 64.1(b)(2) of the Arizona Rules of
Civil Procedure].

16
17 SIGNED AND SEALED this date _____

18 _____, CLERK

19
20 By: _____
Deputy Clerk

21
22 Certificate of service:

Exhibit D

Exhibit "D"
Petition to Amend Rules 45 and 84, Arizona Rules of Civil
Procedure

July 22, 2005

Redacted

Via Facsimile Redacted & U.S. Mail

Redacted

Re: Subpoena Received July 15, 2004 For Appearance in Court, Redacted

Redacted Case No. Redacted

Dear Redacted

I am exercising my right to object to the subpoena served to me on July 15, 2004 because of the hardship imposed on me for the cost of plane tickets (\$270.76) purchased 5/25/2004 for a trip that had been planned prior to the knowledge of the court date of July 26, 2004. Please refer to copy of my e-ticket. When my tickets were purchased for travel from July 24, 2004 through July 31, 2004 to Bellingham, Washington, I was aware of a court date that was to be June 15, 2004. I was not consulted or notified of the change in the court date until the end of June. I am also not a party to this case as the case is against Redacted. This court case has been rescheduled three times and I have never been consulted regarding the dates. However, your clients have changed the court date due to their vacation schedules.

It is my understanding that because I am objecting to this subpoena in writing, that I do not need to comply with the subpoena until a court orders me to do so. I am hopeful that this will not happen.

Respectfully,

Redacted

Exhibit E

Exhibit "E"
Petition to Amend Rules 45 and 84, Arizona Rules of Civil
Procedure

Redacted

November 6, 2006

Redacted

Re: Subpoena for
Redacted vs.

Redacted
Redacted

Dear

Redacted

Please allow this letter to serve to comply with Rule 45 of the Arizona Rules of Civil Procedure to notify you that we formally object to the subpoena issued to Redacted for testimony on November 16, 2006 at 9:00 a.m. in the matter of Redacted vs. Redacted Corporation.

As you know, I am a medical doctor with a very busy medical practice. Your office failed to make any arrangements for my testimony and provided the office with unreasonable notice given I have a full day of patients scheduled on November 16, 2006. In addition, since my only involvement with Redacted was from a medical standpoint, any testimony I would be offering would be subject to our office fee schedule and scheduling policies. You have failed to comply with any of these as well which places an undue burden on me.

While I remain happy to assist attorneys with their litigation needs, I am not in a position to close my medical practice for the day without compliance with our litigation policies, which includes reasonable notice and compensation for my testimony.

Pursuant to Rule 45 I am notifying you in writing of the fact I will not be attending unless I receive a Court Order to do so. Should you have any questions, please feel free to contact my office.

Very truly yours,

Redacted

Redacted

Exhibit F

NOV 02 2007

Redacted

Redacted

October 30, 2007

Redacted

Re: Trial Subpoena No.

Redacted

Dear

Redacted

In my years as an orthopedic trauma surgeon, I have never been railroaded into appearing at a trial as a witness for any patient, as I feel you have done. You basically threatened me with a subpoena to appear at your choice of date and time when you were told I had other legal obligations which were previously scheduled. I have always worked with attorneys when it comes to my patients and they in turn have worked with my schedule.

I agreed to appear at 1:00p.m. on Wednesday, November 14th as a witness for a former patient of mine, [Redacted]. On October 19, 2007, you were in receipt of an invoice in the amount of \$3,000.00 for my trial appearance which [Redacted] in your office confirmed on October 22nd after I received a subpoena to appear on Wednesday, November 14, 2007 at 1:00p.m. with a check in the amount of \$13.00 stapled to it. My secretary, [Redacted], inquired about this \$13.00 and was told by [Redacted] that this is the 'standard witness fee'. This is the first time that an attorney has ever sent me a check for \$13.00 in lieu of my fee (\$3,000.00) for a trial appearance to appear as a witness. When I agree to make a trial appearance, I cannot schedule patients in my clinic; I cannot schedule any surgeries; and I cannot schedule other legal obligations. My fee of \$3,000.00 is less than what I could make in an afternoon of operating and is not an unreasonable amount for my time.

My legal fee schedule states that 'All fees are to be pre-paid 14 business days in advance', which meant that I should have received a check in the amount of \$3,000.00 no later than Thursday, October 25, 2007. To date, I have not received that.

.../2

Redacted

Redacted

Redacted has also mentioned twice to Redacted that I do not have access to any of Redacted Redacted records as she was a patient of mine while I was employed with Redacted. When I changed employment on January 31, 2005, all patient information remained property of Redacted and has since been archived at an offsite company. Redacted asked Redacted to have your office forward any records you have in your possession as this will ensure I have time to review them beforehand. I have not seen Redacted as a patient in 3 – 4 years, and seeing as I perform approximately 600 surgeries per year, I would absolutely need records to review. To date, I have not received any records.

I find at this time, in respect to all of the above mentioned, I have no choice but to object to the subpoena you have issued.

Sincerely,

Redacted

Exhibit G

Exhibit "G"
Petition to Amend Rules 45 and 84, Arizona Rules of Civil
Procedure

RECEIVED
JUL 23 2004

Redacted

July 22, 2004

By FAX and United States Mail

Re: Maricopa County Civil Action

Redacted

Redacted

Dear

Redacted

The above referenced Trial Subpoena was delivered to my residence at approximately 8 P.M. on Friday July 16, 2004. The Subpoena commands my appearance in Maricopa County Superior Court July 26, 2004 - July 30, 2004: 9:30 a.m. I must advise I have prior family business activities scheduled in Colorado, during the time July 26 to July 30, 04.

On July 19, 2004, I attempted to contact your office, the office of Counsel for Redacted and the Maricopa County Superior Court to advise of my prior commitments scheduled during the July 24 2004, July 31, 2004 time period. The commitments include the wedding of my Grand Daughter and finalizing our search for a home in the State of Colorado. Our home in Arizona is under a contract and will be delivered to the new owner September 1, 2004. I hoped we could handle my testimony by deposition or affidavit early in the week of July, 19, 2004, however, your paralegal advised this was not possible. As an alternative I suggested I could possibly fly back to Phoenix on one day during the week of July 26, 2004, if air fare provided and accommodations.

I assure you I have the greatest respect for our Courts and I do not wish to ignore my civil obligations. However, the short notice and prior family commitments are very high priority in our family. Please advise if a future, mutually agreeable, date can be arranged to give my testimony in this matter.

Very Truly Yours,

Redacted

Exhibit H

Exhibit "H"
Petition to Amend Rules 45 and 84, Arizona Rules of Civil
Procedure

Redacted

July 21, 2004

Dear Redacted

In regards to Case No.: Redacted Redacted
Redacted, I will only be available to appear on Monday,
July 26th, due to an undue burden.

I am changing employment and will be in training and then traveling
to attend trade shows across the U.S. Thank You.

Gratefully,

Redacted